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SUPREME COURT OF THE UNITED STATES

TERM, 1982

DOCKET NO._____

UNITED STATES OF AMERICA ex. rel.
JAMES PATRICK,

Petitioner,

vs.

GARY J. HILTON,
Warden, Trenton State Prison,

Respondent.

Petition for Writ of Certiorari to Review the Judgment and Order of the United States Court of Appeals for the Third Circuit

---

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On the Petition
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THE QUESTIONS PRESENTED

1. Was the Petitioner deprived of a fair trial and due process because he could not have been found guilty of first degree murder based upon the jury charge and verdict?
2. Was the Petitioner deprived of his constitutional right to trial by jury when the Court refused to charge second degree murder?
3. Was the Petitioner deprived of indictment by an informed grand jury, due process and a fair trial because of prosecutorial misconduct?
4. Was the Petitioner deprived of his Sixth Amendment right to confront the witnesses against him when the Court admitted hearsay statements made by the victim through her extra-judicial statement and testimony of her attorney?
5. Was Petitioner deprived of his Sixth Amendment right to confront the witness against

him when the Court unduly restricted their cross-examination?

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REPORTS OF OPINIONS

U.S. ex rel. Patrick v. Hilton, No. 81-318 (D.C.N.J. 1981) - unpublished opinion (see Appendix)

STATEMENT OF JURISDICTION

On March 4, 1982, the U.S. Court of Appeals denied Petitioner's request for a certificate of probable cause pursuant to Rule 22(b), Federal Rules of Appellate Procedure. Patrick v. Hilton,

C.A. Misc. No. 81-8170 (3rd Cir. 1982). This request was based upon the dismissal of Petitioner's Habeas Corpus Petition. U.S. ex rel. Patrick v. Hilton, No. 81-318 (D.C.N.J. 1981). The Supreme Court has jurisdicition pursuant to 28 U.S.C. § 1254(1).

TEXT OF AUTHORITIES

U.S. CONSTITUTION

ARTICLE 3, SECTION 2: The trial of all crimes, except in cases of impeachment, shall be by jury; ...

AMENDMENT V: No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except...

AMENDMENT VI: In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsary process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV, SECTION ONE: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C.

Section 1254(1): Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Section 2254(a): (a) The Supreme Court, a Justice thereof, a circut judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

N.J.S.A.

Section 2A:113-2: Murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which is committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, or which is perpetrated in the course or for the purpose of resisting, avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, or murder of a police or other law enforcement officer acting in the execution of his duty or of a person assisting any such officer so acting, is murder in the first degree.

Any other kind of murder is murder in the second degree. A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree.

STATEMENT OF THE CASE

This Petition seeks review of the denial of a Petition for Habeas Corpus based upon the denial of certain Constitutional Rights by the State of New Jersey. The original Petition was filed pursuant to 28 U.S.C. § 2254(a).

The Indictments were obtained by having a police officer read selected portions of statements to the Grand Jury. These statements were made by Wayne Williams, a witness who had lied, failed a polygraph test, and advised the Prosecutor while he was in jail that in exchange for certain consideration, he would tell who the actual murderers were. The Prosecutor failed to disclose this information.

At trial he was the first witness. After identifying Petitioner and Crawford, he testified that Crawford approached him during the week of March 22, 1976, and asked him if he would like to take a $5,000.00 open contract on the victim.

Crawford did not tell him who was issuing the contract, and in response to the offer, he told Crawford that he would think about it. He claimed that the reason that the victim was to be killed was that she was going to be a witness in a narcotics case against Petitioner, which was due to begin on Monday, March 29, 1976, one week after the day the witness was approached.

Williams stated that Petitioner and he met with three other individuals at the corner of Broad and Locust Streets in Philadelphia. The witness and his friends had been stopped for a spot check by the police when Petitioner, driving a four-door yellow Fleetwood, pulled up to speak to them after the police had left. The witness related that at that time Petitioner had allegedly told him that he was pressed for time and would the witness take the contract, as Petitioner would make sure it was worth his while.

The witness testified to a second conversation he had with Crawford three or four days after the killing when Crawford had told him that things

went "sweeter then he thought" and that defendant Crawford had gotten seven instead of five. He was promised a relocation and a change of name in exchange for his testimony, and some Pennsylvania charges were dismissed.

On cross-examination, the witness admitted that he knew Crawford for approximately 3 years and saw him quite frequently at the bars and at parties, and that Petitioner's name was not mentioned during the five minutes that he spoke with Crawford. The defense was prohibited from testing the witness' credibility with regard to his location from the date of the killing, March 28, 1976, until August of 1976 when he first gave the statement to the police.

The witness indicated that he gave his first statement with regard to this matter to the police on August 6, 1976. At that time the witness had charges of impersonating a policeman and rape pending against him in Philadelphia. The witness testified that when he gave the statement of August 6, 1976, he realized that he himself was

personally "involved" and was a suspect.

The witness admitted that the statement of August 6, 1976, did not implicate Petitioner. The witness also stated that after his August 25, 1976 statement, which implicated Petitioner, he left the Philadelphia-Camden area for Georgia, turning himself in on February 22, 1977. The witness testified that he did not have "tools" to commit the crime which had been offered, that is, a silencer. Finally, the witness admitted that although he had been indicted on a narcotics charge within 12 days after his initial statement of August 6, 1976, his bail was not reduced to his own recognizance until he gave the second statement implicating Petitioner on August 26, 1976.

Defense counsel continually pointed out the inconsistencies and discrepancies in the statements of August 6, and August 26, 1976.

The cross-examination by counsel for Crawford produced similar inconsistencies involving the witness' use and abuse, purchasing, and dealing in narcotics and some other factual inconsistencies

with regard to the potential credibility of the witness' statement against defendant Crawford.

The remaining portion of the prosecution's case was an attempt to reaffirm the basic theme that had been laid down during the testimony of Wayne Williams, i.e., that Petitioner had put out an open contract for the killing of Betty Jo Mosley because she was about to testify in a narcotics conspiracy trial against him which was due to begin the day after she was murdered.

In support of this contention, the prosecution brought in a forensic chemist and physician to testify as to the state of the body and the state of the apartment upon the discovery of the corpse. The State produced John Nicholas of the New Jersey State Police Laboratory and the Court qualified him in the area of criminalistics. He testified that the lock on the victim's door had not been picked.

The prosecution then produced arguably the most controversial evidence in the case. Over objection, the State called Francis Malloy, Esq.,

who had acted as attorney for the victim, as she was a co-defendant in the drug charge with Petitioner. After identifying the indictment in question, the witness testified that the victim had agreed to testify on behalf of the State in that case. Over strenuous objection, the witness then testified that his client had two conversations with the Petitioner with regard to the matter in question. The first one was at a party, approximately March 10, 1976, where the Petitioner was alleged to have said the entire case of the prosecution depended on her statements and without her they had nothing. The second was a conversation shortly before the trial and again the Petitioner supposedly had called the victim and told her that he read her written statement and he was very upset about it.

On cross-examination counsel showed that Petitioner was only one of seven people in Incictment 169-75 and that the memorialization of these conversations did not occur until six and seven months later, and then only at the request of the

prosecutor. The witness testified that the victim had been released on her own recognizance only after the statements and that type of bail reduction in this type of case was unusual. Finally, the witness admitted that the statement implicated many others in addition to Petitioner.

After the testimony of Malloy and prolonged argument of counsel, the State was then able to have the statement of the victim, Betty Jo Mosley, read into evidence in its entirety. The court reporter then read the entire 43 page statement of the victim to the jury. While the prosecutor alleged that the basis for same was to show motive, the statement was explicit in dealing with narcotic activity in which the Petitioner and others were involved.

Two subsequent prosecution witnesses, John Little and Reginald Hilton, testified as to additional criminal information and evidence taken from the scene of the crime including the slug and casing of an empty shell and a photo of the victim and Crawford together. Hilton further testified

that although he searched for signs of a struggle or forced entry, he found none.

The State then called Jean Wilcox who identified Petitioner and Crawford. She testified that Petitioner had shown her the victim's written statement and had admitted that her testimony was "pretty damaging to him." However, the witness was also allowed to testify as to conversations that she had with the victim in which she was alleged to question why a contract was out on her. On cross-examination the witness admitted that Petitioner had told her that he would never hurt the victim and that if she did get hurt or even "fell down, they would blame it on me." The defense counsel was also prohibited on cross-examination from showing through this witness that other individuals had allegedly threatened the victim's boyfriend in the presence of the victim as the trial judge had ruled same was collateral.

The prosecutor then called Richard Friedman who testified that he gave Petitioner a copy of Betty Jo's statement. He also testified in detail

that Petitioner had plead guilty to the drug charges after the murder of the victim pursuant to a plea bargain.

The final prosecution witness was Stephen "Country" Williams who had testified over objection that he was a frequent patron of the Doll House, a tavern operated by Crawford. He stated that one day a group of men were there discussing a contract with Petitioner and others while Crawford was there. He left to go next door to get a sandwich and when he came out of the sandwich shop, he was grabbed by some gentlemen and told that if he ever repeated anything he heard that "they would find me somewhere." The defense argued vociferously that the acts and statements of these unidentified gentlemen should not have been admitted.

The witness also testified that he overheard a conversation about a contract between Petitioner and Crawford.

He further testified that Crawford was with him on the night that Betty Jo Mosley was murdered

and that Crawford had dropped him off at 1:30 in the morning and picked him up again at 5:00 a.m. and had said, "I killed the bitch." He also testified that he and Crawford had gone to Philadelphia to pick up the gun and then had returned to Philadelphia after the murder to exchange to gun for money. Williams testified that he had originally given a false statement to the police, initially naming Wayne Williams as the murderer of Betty Jo Mosley. On cross-examination the witness admitted that he originally lied. He also testified that he had heard Petitioner read the statement of Wayne Williams to Crawford in jail, and that after having given his statement to the prosecutor, he was released from jail. The witness stated that no one that he knows of had witnessed the incident outside the bar, although it happened in the daytime on a busy street. He also testified that the gun that was used was a .45 caliber gun with a silencer. He admitted the numerous lies in his initial statement of October 6, 1976. When the defense attempted to show that this wit-

ness had a girlfriend at the Canterbury Apartments, the same place where the victim had lived and that he was there frequently, it was ruled collateral and the defense was unable to question the witness about this matter. Again when defense counsel apparently had the witness ready to make a damaging admission, the court ruled this was also a collateral area, and the defense counsel was unable to properly pursue it.

The prosecution then put in additional witnesses to prove its case against Crawford, including the police officer who, when arresting Crawford, testified as to the amount of cash in his possession. Reginald Perry testified that Crawford had flashed $5,000.00 in cash shortly after the murder, although on cross-examination the witness avowed that he was under intense pressure by the police at the time his statement was given.

The final witness for the State was Dr. Rueben Block who testified that he had performed a circumcision on Petitioner on Sunday, March 26, 1976, the day before the trial was to begin. The

State was attempting to show that Petitioner was attempting to establish an alibi at the time of the killing. On cross-examination, however, the doctor admitted that it was he who scheduled the operation not the defendant.

Petitioner's case began with the testimony of Joseph Majarowitz who visited Wayne Williams at the Salem County jail and testified that Williams had told him that he would not talk to him since he was afraid that there were sealed indictments for 4 or 5 contract killings in Camden County against him.

Patricia Patrick then testified that she was the Petitioner's wife and that she took him to the hospital on Sunday, March 28, 1976.

Several other witnesses were presented on behalf of Petitioner.

The Petitioner took the stand and testified that he was currently residing at Trenton State Prison serving a term of 17 to 24 years for a drug conviction under Indictment No. 169-75. He stated that he knew the victim for eight years and

had worked with her for 2 years in 1974 and 1975. She was a co-defendant in a drug conspiracy case under Indictment No. 169-75.

He stated that he first saw the statement that the victim had given against him in March of 1976 and had discussed it with the witness Wilcox. He testified that he pled guilty to Indictment No. 169-75. He testified that he was at his uncle's house Saturday night and that he had never been in the area of Broad and Market Street that night as Wayne Williams had testified. This was corroborated by Lawrence Patrick's testimony. He did stop a car in the area of Broad and Locust about two weeks before Betty Jo had been murdered but talked only to Jimmy Morton. He stated that he does not know Stephen Williams personally although he was in the same jail cell with him and he never had anything to do with any contract on Betty Jo Mosley.

On cross-examination the prosecutor attempted to show that Petitioner had stated at his plea retraction in Indictment No. 169-75 that the tape recordings in the possession of the prosecutor in-

dicated that he had only possessed a small amount of heroin, therefore, creating the inference that the victim's statement was a substantial part of the case against the Petitioner. Then over strenuous objections of the defense, questions concerning the amount of heroin involved in Indictment No. 169-75 were permitted. Petitioner then rested.

On October 26, 1977, the judge charged the jury but refused to charge second degree murder after a finding that no factual basis existed for it. In answer to a question from the jury on Thursday, October 27, 1977, concerning the type of involvement required to convict or acquit, the trial Judge recharged the jury. Counsel for Petitioner objected to this charge.

Both Petitioner and Crawford were convicted of conspiracy. Although Crawford was acquitted of the murder, Petitioner was convicted. Petitioner appealed to the Superior Court of New Jersey and the conviction was affirmed. The New Jersey Supreme Court denied the Petition for

Certification, and Petitioner sought federal relief by way of habeas corpus.

ARGUMENT

I.

The State's theory of the case was that Petitioner engaged his co-defendant, Charles Crawford to kill Betty Jo Mosley. The Trial Court's instructions included the following jury charge:

> The State contends that James Patrick put out a contract for the murder of Betty Jo Mosley. In other words, that he offered to pay a sum of money for her murder, and that defendant, Charles Crawford, accepted and performed the contract and that he, Charles Crawford, was the actual murderer. If you so find this as a fact, you may then hold the defendant, James Patrick, equally responsible with the defendant, Charles Crawford.... (emphasis added).

In addition, the Court charged the jury that they could find both defendants guilty if they "aided or abetted each other or others in the commission of the offense". The record is void of any references that anyone other than Crawford was aided in the commission of the offense.

Although both defendants were convicted of conspiracy, the jury acquitted Crawford of the murder. Based upon the acquittal of Crawford, there could be no basis for Petitioner's conviction. The Court failed to give a cautionary charge that if they found that Crawford was not the perpetrator, then Petitioner could not be convicted. Since New Jersey law provides that it is necessary to show that an offense has been committed by a principal in order to convict an abettor, not only should Petitioner have been acquitted as a principal, but also as an abettor. Since no evidence was presented to show that someone other than Crawford was the perpetrator, any such charge would be erroneous.

The U.S. District Court denied Petitioner's Habeas Corpus Application (after exhaustion of all state remedies), based upon an erroneous fact finding. Specifically, the Court found that Petitioner and Crawford offered money to other conspirators to commit the crime, when in fact, the

State's theory was that Petitioner offered money to Crawford. This is significant since the Court then denied the application finding a conspiracy, broader than Petitioner and Crawford, in which Petitioner participated, and from which an unknown member, other than Crawford, was the perpetrator. This was not the State's theory, was not in accord with the evidence, and if permitted to stand, deprives Petitioner of a fair trial and due process.

II.

The District Court found that Petitioner had not requested a charge of second degree murder. This was not correct. Petitioner had requested a charge of second degree murder, however, the Court instructed the jury that although they normally would have been given the option of considering the offense of second degree murder, they would not be given that option.

At the time of the offense, New Jersey recognized two degrees of murder, first, being a willful, deliberate and premeditated killing, and second being any other kind. This created a pre-

sumption of second degree murder, with a less severe sentence. The State always has the burden of proving premeditation in order to elevate the crime to the first degree, even in a felony-murder situation.

The Trial Court refused to charge second degree murder because it saw "no factual for the jury to find that whoever committed the murder was let into the apartment" (of the victim). Two of the State's witnesses testified that there was no evidence of forced entry, and the Prosecutor stated during the summation that "We know there were no signs of forced entry." Therefore, it was clear error to fail to charge second degree murder.

This had significant impact upon the jury, since it cast Petitioner in a very unfavorable light. It was reasonable for the jury to believe that the State had met the burden of proving murder, and that they were left with determining whether or not it was premeditated. Left with a belief that murder had been established, and faced with either an acquittal or conviction, they were

forced to return a conviction.

Petitioner had been stripped bare of his cloak of innocence. He had been deprived of his right to a trial by a jury of his peers.

III.

The Prosecutor engaged in various acts of prosecutorial misconduct, thereby depriving Petitioner of several fundamental constitional rights.

First, the Prosecutor did not permit Wayne Williams, his key witness to testify before the Grand Jury although he was available. The reasons were obvious - he had lied in an earlier statement and his reliability was questionable at best. Had the Grand Jury had the opportunity to observe him, no indictment would have been returned. Instead, the Prosecutor had a police officer read selected portions of his testimony into the record. That testimony only incriminated Crawford. The only connections to Petitioner were conclusions drawn by the investigating officer. William's testimony was that he had never met the Petitioner, but may have spoken to him on the telephone, and no

where in his testimony was there an actual link between Crawford and Petitioner.

Williams had failed a polygraph test and he had withheld information from his first statement.

In addition, the Prosecutor failed to disclose that after he gave the statements ultimately relied upon, Williams called from the Salem County Jail, and stated that for certain considerations he would disclose the identity of the actual murderer as well as certain other factors. This clearly shows that Petitioner and Crawford were not the perpetrators, however, the Prosecutor disregarded this, and took the prior statements to the Grand Jury. Failure to disclose such exculpatory statements is clearly prosecutorial misconduct.

In addition, Williams refused to talk with Petitioner's investigator, not because of his concern for the defense, but because of his concern for the prosecution.

This was not the extent of the prosecutorial misconduct: he failed to advise Petitioner that

another key witness had recanted and prevented the Petitioner's investigator from contacting another witness. The prosecutor offered a third witness a concurrent sentence instead of nine consecutive sentences if he would change his statement to conform with a police report.

When taken as a whole, the preceding acts show that the prosecutor was more concerned with convicting Petitioner then in obtaining justice. The systematic pattern of misconduct impeded the defense and denied Petitioner of due process and a fair trial.

IV.

The Prosecutor intended to call Francis Malloy, Esquire, attorney for the victim to show Petitioner's motive for killing his client, arguing that Petitioner had said that her statement was the only evidence against him. Such statements are double hearsay. The prosecutor argued that it was not hearsay - it was not being admitted for the truth of the matter. Petitioner was being denied the right to confront his accuser.

The court overruled Petitioner's objection.

Mr. Malloy was called as a witness. He testified that the witness told him that "she met Petitioner at a party and he told her that he had heard she made a statement and she said "yes, but not a signed statement". She indicated that Petitioner "had called her and that he now had personal knowledge that she had signed a written statement outlining matters which involved him and that he was very upset about it".

The witness at trial is repeating what the victim is saying that the Petitioner said. This is hearsay, and the Petitioner was deprived of the right to cross-examine the declarant.

The prosecutor moved to have the statement of the victim introduced in order to show the motive of Petitioner. Petitioner objected to introduction of the statement in its entirety.

The court stated that it was not necessary to show the details of the narcotics case item for item, but that the jury was entitled to know that the victim was more than a peripheral witness.

The court recognized that it must give a limiting instruction to show that Petitioner had a motive to kill the victim.

At this point, the entire statement was read into the record contrary to what the court had just ruled.

Evidence of other crimes committed by a person, even though of like nature, may not be introduced to show that a person would be likely to commit the crime charged. When the situation presents itself, the court should recognize the fundamental distinction between evidence which is only relevant to criminal disposition and that which is relevant to a particular fact in issue before the jury.

Even where certain evidence may have some bearing on motive, it should not be automatically introduced in its entirety. The court must balance the probative value of the evidence against its potential for prejudice, and where the evidence is highly prejudicial and that clearly outweighs its probative value, it should not be admitted.

The prosecutor contended that the limiting instruction to the jury would dispell any prejudice.

As set forth above, the court stated that only the portions of the statements which showed that the victim was not a peripheral witness should be presented to the jury. This was not the case, however. The prosecutor clearly exceded these bounds when the entire statement was read into the record, and showed the details of the narcotics case item for item.

In the statement, the victim described the places where the Petitioner carried on his drug trade, i.e., Camden, Philadelphia, Atlantic City, and North Jersey. She named the workers, one by one with detailed descriptions of each, and the amount of heroin each worker received. She went into the financial arrangement between the Petitioner and herself, stating wholesale and retail prices of the heroin.

She centered in on the drug trade in Philadelphia, describing in detail the procedure for cutting the heroin and the participants who did it.

The extensive detail was unwarranted and unjustified. It was introduced to show that the Petitioner was a despicable and horrendous person.

The prosecution also read into evidence portions which contained highly prejudicial remarks of no probative value. The victim mentioned the Petitioner's many girlfriends, and a woman who gave birth to two of the Petitioner's children. These statements were in no way related to the drug trade. Their only value to the prosecution was to show that the Petitioner was immoral. She further mentioned that Petitioner had a gun. This was unduly prejudicial and was introduced to instill in the jury the picture of Petitioner killing the victim. The statement makes reference to the presence of children while heroin was "cut", and that the children participated. Nothing in the statements was less probative and more prejudicial than this remark. The picture of little children cutting and bagging heroin only showed how disgusting the Petitioner and his friends were.

Admitting the entire statement exceeded the

boundaries established by the trial judge. It was of no probative value and was extremely prejudicial. The admission of the statement in its entirety was not only beyond the limits set by the trial judge, but highly prejudicial. This Court must realize that the prosecutor's motive in introducing the entire statement was only to inflame the jury. Furthermore, Petitioner was deprived of the right to cross-examine the declarant.

V.

The Trial Court unduly restricted his cross-examination, thereby depriving Petitioner of his Sixth Amendment right. Specifically, Petitioner could not cross-examine the witness about a prior statement, denied on the stand, that he had a girl friend who resided in the same apartment complex as the victim and that he was a frequent visitor there, thereby placing him at the scene of the crime. Furthermore, when the witness was about to admit that he was a "pimp", the court once again halted cross-examination. It was clear that the witness was engaged in prostitution and had

and had an on-going business relationship with Wayne Williams, the other principal witness for the State.

Since there were no eye-witnesses to the crime for which Petitioner was accused, credibility of the witnesses testifying as to circumstantial evidence becomes most critical.

The Court unduly restricting cross-examination by failing to permit the Petitioner to show that Stephen Williams had previously admitted being at the scene of the crime, thereby not only making him a liar, but a suspect, and his testimony totally self-serving. Furthermore, both Wayne Williams and Stephen Williams were involved together in illegal activities making their credibility suspect.

When cross-examining another State's witness, Jean Wilcox, the defense attempted to show that the victim's boyfriend had been threatened with harm while in the victim's presence by someone other than Petitioner. Since the State's entire theory of the case revolved around Petitioner's

motive, denial the right to rebut motive on cross-examination by showing that someone else wanted to victim dead, is also an obvious denial of the confrontation provision of the Constitution.

CONCLUSION

Based upon the foregoing, the United States Supreme Court should grant Petitioner's Petition for Certiorari.

Respectfully submitted,

Lawrence W. Saltzman

LAWRENCE W. SALTZMAN

NOT FOR PUBLICATION

UNITED STATES OF AMERICA ex rel. JAMES PATRICK,	:	UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY
Petitioner,	:	CIVIL ACTION NO. 81-318
v.	:	
GARY J. HILTON, Warden, Trenton State Prison	:	OPINION
Respondent.	:	

FISHER, Chief Judge.

Petitioner, James Patrick, an inmate at Trenton State Prison, requests this court to issue a writ of habeas corpus pursuant to 28 U.S.C. §2254. Numerous constitutional improprieties allegedly occurred in New Jersey State Court and, consequently, give rise to petitioner's claim that he is being held in custody contrary to the Constitution. Petitioner argues that: (1) the trial court failed to instruct the jury on second-degree murder; (2) certain prosecutorial misconduct tainted the trial; (3) numerous pieces of

evidence were erroneously admitted at trial; (4) the State of New Jersey lacked jurisdiction to issue an indictment; (5) the trial court unduly restricted cross-examination of certain State witnesses; and (6) the trial court should have allowed severance in order to permit petitioner to confront his co-defendant.

This case comes before me in the following procedural posture. A Camden County grand jury filed an indictment on August 26, 1976, charging petitioner and co-defendant Charles Crawford with unlawfully conspiring to commit the murder of Betty Jo Josley, in violation of N.J.S.A. 2A:98-1. On April 27, 1977, a second indictment charged petitioner and Crawford with unlawfully, feloniously and with malice aforethought, murdering Betty Jo Mosley, contrary to N.J.S.A. 2A:113-1, and with committing the murder while armed with a handgun, in violation of N.J.S.A. 2A:151-5.

Petitioner and Crawford appeared before the Honorable Leon A. Wingate, Jr., J.S.C., on September 26, 1977 for pretrial motions. The

court denied petitioner's motions to dismiss the indictments for inadequate proof and prosecutorial wrongdoing and for severance of the co-defendant's trial. After a trial lasting from October 17 through October 27, 1977, the jury convicted petitioner of conspiracy to commit murder and of first-degree murder. Crawford was convicted of conspiracy to commit murder. Both parties were found not guilty of murder.

On December 2, 1977, petitioner was sentenced to a term of not less than 35 months nor more than 3 years on the first indictment and to a term of life for the second indictment. The life term was ordered to run consecutively to the first sentence and concurrently with the other sentence being served for a tangentially related narcotics conviction.

Petitioner filed a notice of appeal on January 13, 1978. After a consolidation with Crawford's appeal, the New Jersey Superior Court, Appellate Division, on September 30, 1980, affirmed petitioner's conviction. Petitioner's

request for certiorari to the New Jersey Supreme Court was denied on December 4, 1980. This petition for a writ of habeas corpus was then filed on February 3, 1981.

I

Petitioner charges that two aspects of the trial court's jury instruction violated his right to due process of law under the Fifth Amendment and, therefore, constitute reversible error. The trial court refused to charge second-degree murder and charged that petitioner and Crawford could be found guilty of murder if they aided and abetted each other or others in the commission of the crime.

A defendant is entitled to have the trial court instruct the jury as to manslaughter (second-degree murder) whether or not it is consistent with the theory of his defense, if that instruction has some foundation in the evidence. State v. Powell, 84 N.J. 305, 317. See also State v. Mathis, 47 N.J. 455, 467 (1966), aff'd, 52 N.J. 238, rev'd on other grounds, 403 U.S. 946 (1971), reh. denied,

404 U.S. 876 (1971). However, it is an error for a trial judge to deliver a jury instruction on a criminal charge for which there is no, or insufficient, evidence to support the instruction. State v. Christener, 71 N.J. 55, 73 (1976).

Petitioner and Crawford were indicted, inter alia, for murder and conspiracy to murder. The State intended to prove that petitioner and Crawford conspired to murder and did murder Betty Jo Mosley in a "contract killing," i.e., they had offered money to other conspirators who would kill Mosley. Petitioner denied the existence of the conspiracy and any involvement in the murder of Mosley. He did not offer alternative theories or defenses based on mitigating circumstances nor did he request a charge of second-degree murder.

The essence of a "contract killing" is premeditation, the distinguishing factor between first-degree and second-degree murder. Evidence before the court supported the finding that Mosley's murder was premeditated and the result of a conspiracy. Since it would be error for the

trial judge to charge the jury on a crime for which there is no or little evidence, the judge's instruction of first-degree murder was proper. State v. Christener, 71 N.J. at 73.

Petitioner also objects to the trial court's jury instruction that petitioner and Crawford could be found guilty of murder if they "aided or abetted" each other or others in the commission of the offense. Petitioner claims that there is no evidence in the record that anyone other than petitioner and Crawford committed the murder or that petitioner aided or abetted anyone other than Crawford. Petitioner states that he cannot be found guilty of aiding or abetting unless a principal whom he has aided or abetted committed the crime.

Crawford and petitioner were indicted as principals in the murder and conspiracy counts. Although the State's theory at trial was that Crawford committed the actual murder, Crawford's acquittal for murder does not invalidate petitioner's murder conviction or negate his role as a partner in

the conspiracy. See United States v. Bryan, 490 F. Supp. 1234, 1240 (D.N.J.), aff'd, 636 F.2d 1211 (1981). "It is, of course, clear that a defendant may be convicted as an aider and abetter when the principal has not been convicted, has not even been charged, or may be unknown." United States v. Bryan, 483 F.2d 88, 97 (3d Cir. 1973). Petitioner's reliance on United States v. Bernstein, 533 F.2d 755, 799 (2d Cir.), cert. denied, 429 U.S. 998 (1976), is inappropriate because the petitioner in that case was not indicted as a principal and a co-conspirator.

Furthermore, a conspiracy makes each conspirator liable for the acts of every other conspirator in pursuance of the conspiracy. State v. Carbone, 10 N.J. 329, 340 (1952). The quantum of evidence revealed at trial supports the theory that a conspiracy was forged by petitioner to kill Mosley in order to prevent her from testifying at his upcoming trial for narcotics violations. It is not necessary for the State to show who committed the actual shooting. State v. Morales, 111

N.J. Super. 521, 525 (App. Div. 1970). Assuming, arguendo, that petitioner did not commit the actual murder, he is nonetheless liable for the acts of his co-conspirators.

II

Petitioner charges reversible error from the alleged prosecutorial misconduct arising out of: the indictment; the introduction of hearsay evidence at the grand jury hearing; and the failure to present exculpatory evidence to the grand jury. An indictment based on hearsay evidence is not necessarily constitutionally invalid, Costello v. United States, 350 U.S. 359, 363 (1956), and will be dismissed only if the hearsay evidence impaired the integrity of the grand jury proceeding. United States v. Cruz, 478 F.2d 408, 411 (5th Cir.), cert. denied, 414 U.S. 910 (1973). "An indictment based on hearsay is invalid where (1) nonhearsay evidence is readily available; (2) the grand jury is misled into believing it was direct testimony rather than hearsay; and (3) there is a high probability that, had the grand jury heard the eye-

witness, it would not have indicted." United States v. Wander, 601 F.2d 1251, 1260 (3d Cir. 1979), quoting United States v. Cruz, 478 F.2d at 410. While the presentation of hearsay testimony of an investigating officer in lieu of readily available testimony by direct witnesses is by no means a preferred procedure, it is neither unconstitutional nor inherently wrong. Cruz, 478 F.2d at 411.

Petitioner contends that FBI investigator Albert Charles should not have been permitted to read aloud two sworn statements given to him by Wayne Williams concerning Williams' conversations with petitioner and Crawford. Charles explained that he had taken these statements from Williams in the presence of a court stenographer and, therefore, did not mislead the grand jury into believing that it was hearing direct testimony. There was a significant amount of evidence presented to the grand jury upon which they could indict petitioner. There is a very low probability that petitioner would not have been in-

dicted had Wayne Williams testified personally. Petitioner's reliance on State v. Costa, 109 N.J. Super. 243 (Law Div. 1970), is inappropriate because Wayne Williams' statements were sworn to and recorded by a court stenographer. In Costa, there was not even an attempt to introduce sworn statements of witnesses before the grand jury upon which an indictment might properly be based. See State v. Laws, 50 N.J. 159, 182 (1967). Here, there were sworn statements introduced before the grand jury.

Petitioner claims further that the prosecutor withheld exculpatory information from the grand jury. The grand jury should be apprised of all information which would be deemed essential in order to make an informed and independent judgment of whether or not to return an indictment. See Wood v. Georgia, 370 U.S. 375 (1962). The prosecutor is not required to search for and present to the grand jury evidence which is favorable to the defendant or which negates guilt when such information has not been requested by the grand

jury. United States v. Ciambrone, 601 F.2d 616, 622 (2d Cir. 1979). The court will invalidate the indictment only if the prosecutor withheld substantial evidence negating guilt which, if presented, would have dissuaded the grand jury from returning an indictment. Ciambrone, 601 F.2d at 623.

Petitioner claims that the prosecutor did not present information in Williams' second statement implicating Crawford in the murder. There is nothing contained in these omitted facts which refute Williams' other statements concerning his conversation with petitioner about the murder of Mosley. Had these facts been read to the grand jury, petitioner certainly would have been indicted. Petitioner's reliance on United States v. Phillips Petroleum Co., 435 F. Supp. 610 (W.D. Okla. 1977), is misplaced because the omitted evidence in the present case did not contradict the other evidence upon which the grand jury could indict petitioner for murder and conspiracy.

Petitioner claims that the prosecutor's failure to disclose the name of Wayne Williams when it became available and the failure to notify petitioner that Ellen Danise had recanted her testimony is misconduct requiring reversal. These claims are without merit. Williams was under a protective order and petitioner was notified at least five weeks preceding trial of Ms. Danise's change of testimony.

Petitioner's claim that the grand jury did not possess subpoena power to obtain telephone records is meritless. The State fulfilled the requirement of subpoena duces tecum by showing that the documents bear some possible relationship to the grand jury investigation. See In Re Grand Jury Subpoena Duces Tecum, etc., 391 F. Supp. 991, 997 (D.R.I. 1975). Also, the importance of these documents is clear in the present case where Williams and petitioner discussed the "murder contract" on the telephone.

III

Petitioner claims that the trial court com-

mitted reversible error by admitting into evidence several statements concerning his prior criminal activity. Petitioner objects to the statement of Betty Jo Mosley, the testimony of Frances Malloy, and the cross-examination of petitioner.

Betty Jo Mosley's statement detailed her knowledge of petitioner's narcotics-related activities for which he was awaiting trial. Evidence of other crimes or bad acts may be admissible to prove the motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Fed. R. Evid. 404(b); N.J.R. Evid. 55. Whether the evidence's probative value outweighs the danger of undue prejudice must be determined by the trial court, even if the evidence is otherwise admissible. Fed. R. Evid. 403; State v. Atkins, 78 N.J. 454, 462 (1979).

Contrary to petitioner's contention, Mosley's statement was not introduced to prove the truth of the matter therein asserted, i.e., that petitioner was guilty of the allegations in Mosley's statement. It was introduced to show petitioner's motive for

wanting Mosley killed. Since the statement's probative value outweighed its prejudicial effect, the trail court correctly instructed the jury in the use of the statement.

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm in a specific command of Congress." Kotteakos v. United States, 328 U.S. 750, 764-65 (1946). Assuming, arguendo, that Frances Malloy's testimony constituted hearsay, its introduction could not have had more than a slight effect on the jury in light of the other evidence presented. Its introduction was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967). Independent evidence revealed that petitioner on several occasions had discussed Mosley's murder and the reasons for wanting her murdered with Wayne Williams. Petitioner even stated at trial that he was upset that Mosley was to be a key

witness against him.

The prosecutor's cross-examination of petitioner at trial concerning his narcotics-violations charges was permitted for the purpose of showing that Mosley's testimony was more damaging than petitioner admitted in his earlier testimony. The trial court instructed the jury that the evidence of precise wrongdoing was not introduced to infer guilt in the present case. The trial court is given wide latitude to control cross-examination and since no clear error or prejudice is shown, I find no abuse of discretion. Cestero v. Ferrara, 110 N.J. Super. 264, 273 (App. Div. 1970), aff'd, 57 N.J. 497 (1970).

IV

Petitioner's claim that New Jersey lacked jurisdiction to indict and convict him beyond a reasonable doubt for conspiracy is incorrect on the law and the facts presented at trial. N.J.S.A. 2C:1-3 states

> Except as otherwise provided in this section, a person may be convicted under the law of this state of an offense com-

mitted by his own conduct or the conduct of another for which he is legally accountable if:

(1) Either the conduct which is an element of the offense or the result which is an element occurs within this state;

...

N.J.S.A. 2C:5-2 states

A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) Agrees to aid such other person or persons in the planning or commission of such crime or if an attempt or solicitation to commit such crime.

Further, petitioner, an integral partner in the conspiracy, is responsible for all statements and acts made by co-conspirators such as Crawford in furtherance of the conspiracy. See, e.g., State v. Carbone, 10 N.J. 329, 340 (1952). Petitioner discussed the "murder contract" with Wayne Williams in New Jersey on at least one occasion.

In addition, Williams discussed the murder with Crawford in New Jersey. Therefore, New Jersey had jurisdiction to indict petitioner for conspiracy.

Petitioner claims that the trial court improperly permitted hearsay testimony by Stephen Williams concerning a confrontation with unindicted co-conspirators outside of the Doll House Bar. The testimony was not introduced to prove the truth of the matter therein asserted, i.e., that the threat would be carried out. It was introduced to relate a threat given to him by unknown co-conspirators, named in the indictment, in furtherance of the conspiracy of which defendant was proven to be a member. State v. Boiardo, 111 N.J. Super. 219, 231 (App. Div.), cert. denied, 57 N.J. 130, cert. denied, 400 U.S. 859 (1970). Furthermore, out-of-court statements in furtherance of the conspiracy by a co-conspirator may be admissible "against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the

defendant" if the statements were in furtherance of the conspiracy. United States v. Trotter, 529 F.2d 806, 811 (rd Cir. 1976), quoting United States v. Nixon, 418 U.S. 683, 701 (1974). A preponderance of independent evidence proves the existence of a conspiracy involving several co-conspirators.

The trial court's restriction of petitioner's cross-examination of Jean Wilcox was not an abuse of its discretion. See United States v. Watson, 599 F.2d 1149, 1157 (2d Cir. 1979). Assuming, arguendo, that such cross-examination had been permitted, it would not have affected the inculpatory evidence produced at trial. An attempt to show, through Wilcox's statement, that others might have been involved in the conspiracy would not have detracted from the specific evidence against petitioner and Crawford. Since it is not clear that petitioner was denied his constitutional right of confrontation, the court's decision should not be reversed. Alford v. United States, 282 U.S. 687, 694 (1930).

V

Petitioner charges reversible error in the trial court's denial of his severance motion. Motions for severance rest in the discretion of the trial judge whose determination should not be disturbed in the absence of an abuse of discretion. United States v. Boyd, 595 F.2d 120, 125 (3d Cir. 1978) (citations omitted). The defendant must demonstrate that the denial of his motion clearly and substantially prejudiced him and that it resulted in a manifestly unfair trial. See United States v. Herrera, 584 F.2d 1137, 1143 (2d Cir. 1978). "As a general rule, defendants who are indicted together and properly joined should be tried together, unless a sufficient showing of prejudice is made to invoke the discretion of the court under Rule 14." United States v. Addonizio, 313 F. Supp. 486, 498 (D.N.J. 1970), aff'd 415 F.2d 49 (1971), cert. denied, 405 U.S. 936, reh. denied, 405 U.S. 1048 (1972).

Petitioner claims that he could not confront Crawford, his co-defendant. This is usually the case when co-defendants are on trial and petitioner has failed to demonstrate how he was clearly or substantially prejudiced. When given the opportunity to cross-examine Crawford, petitioner declined. Petitioner's reliance on Burton v. United States, 391 U.S. 123 (1968), is inapposite because in the present case substantial evidence included in the testimony of Wayne Williams inculpated petitioner. Williams was also available for cross-examination.

The petitioner's arguments are without merit. All other contentions are without merit. The petition for habeas corpus is denied. No costs. An order accompanies this opinion.

October 19, 1981.

UNITED STATES OF AMERICA ex rel. JAMES PATRICK,	:	UNITED STATES DISTRICT COURT
	:	DISTRICT OF NEW JERSEY
Petitioner,	:	CIVIL ACTION NO. 81-318
v.	:	
GARY J. HILTON, Warden, Trenton State Prison,	:	ORDER DISMISSING PETITION FOR HABEAS CORPUS
Respondent.	:	

For the reasons set forth in the court's opinion dated and filed October 19th, 1981, it is on this 19th day of October, 1981,

ORDERED that the petition in the within matter be dismissed. No costs. There is no probable cause for appeal.

/S/ Clarkson S. Fisher
CLARKSON S. FISHER, Chief Judge
United States District Court

January 25, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C. A. MISC. REC. No. 81-8170

JAMES PATRICK,

Appellant

vs.

HILTON, GARY J., and THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

(D. N.J. Civil No. 81-318)

Present: ADAMS and SOLVITER, Circuit Judges, and VAN ARTSDALEN, District Judge*

Submitted by the Clerk, on appellant's behalf, is a request for certificate of probable cause pursuant to Rule 22(b), Federal Rules of Appellate Procedure

in the above-captioned matter listed for February 16, 1982 or as the Court decides.

Respectfully,

CLERK

SM:EGM:mk
enc.
* Sitting by designation.

The foregoing Motion is/are

Denied.

By the Court,

/s/ Arlin M. Adams
ARLIN M. ADAMS, Judge

DATED: March 4, 1982